Supreme Court, U.S.
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No. 02-193

IN THE

Supreme Court of the United States

INTERMATIC INCORPORATED,
Petitioner,

v.

THE LAMSON & SESSIONS CO.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner has made a sufficient showing to merit a grant of certiorari, vacatur, and remand in light of *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 122 S. Ct. 1831 (2002), where petitioner's sole argument for GVR relief is not dependent upon *Festo*, was rejected by the court of appeals on grounds unaffected by the *Festo* decision, and has been again rejected by the court of appeals since this Court's *Festo* decision.

CORPORATE DISCLOSURE STATEMENT

Respondent The Lamson & Sessions Co. is a publicly traded corporation. No parent or publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

STATEMENT 1

REASONS FOR DENYING THE PETITION 7

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Allen Eng'g Corp. v. Bartell Indus., Inc., 299 F.3d 1336 (Fed. Cir. 2002) 6, 7,10

Alpex Computer Corp. v. Nintendo Co., 102 F.3d 1214 (Fed. Cir. 1996) 10

Am. Permahedge, Inc. v. Barcana, Inc., 105 F.3d 1441 (Fed. Cir. 1997) 10

Builders Concrete, Inc. v. Bremerton Concrete Prod. Co., 757 F.2d 255 (Fed. Cir. 1985) 5, 10, 11

Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., 122 S. Ct. 1831 (2002) ..... *passim*

Henry v. City of Rock Hill, 376 U.S. 776 (1964) 7

Lawrence v. Chater, 516 U.S. 163 (1996) 7

Southwall Techs., Inc. v. Cardinal IG Co., 54 F.3d 1570 (Fed. Cir. 1995) 7, 10

Taylor v. Cain, 533 U.S. 656 (2001) 9

MISCELLANEOUS

Brief for the United States in No. 00-1543, *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.* 11

Donald A. Chisum, 4 *Chisum on Patents*, § 11.07[4] (2001) 2

Robert L. Stern & Eugene Gressman, *Supreme Court Practice* (8th ed. 2002) 7, 8

RESPONDENT'S BRIEF IN OPPOSITION

The petition for certiorari should be denied. Although petitioner seeks GVR relief in light of *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 122 S. Ct. 1831 (2002), it offers only one argument in favor of GVR, and it is clear that this argument does not depend at all on this Court's decision in *Festo*. Rather, petitioner's argument is one that has been rejected by the Federal Circuit at every turn since 1985, was rejected by the Federal Circuit in this case, and has been again rejected by the Federal Circuit in the months *since* this Court's decision in *Festo*. Because this lone argument does not demonstrate a reasonable probability that the decision below would in any way be altered in light of this Court's decision in *Festo*, the petition should be denied.

STATEMENT

1. Petitioner Intermatic Incorporated ("Intermatic") initiated these two patent-infringement actions against respondent The Lamson & Sessions Co. ("Lamson") claiming that certain plastic weatherproof covers for electrical outlets manufactured by Lamson infringed U.S. Letters Patent No. 5,280,135 ("the '135 Patent"), which issued in January 1994 and was assigned to Intermatic, and which was reexamined in 1996-97. Pet. App. 1a-2a. The '135 Patent describes an electrical outlet cover, consisting of a base plate into which inserts are fitted. The inserts have openings for various outlet configurations, and an appropriately configured insert can be selected and placed into the aperture of the base plate to cover a particular outlet. The object of the patent was to fit numerous potential configurations using just one common base and housing. Pet. App. 2a, 7a; C.A. App. A169, col. 7, line 62-col. 8, line 59.

2. The '135 Patent has nineteen claims. Only one claim limitation, present in all but one of the patent's independent claims (claims 1, 12, 13, and 14), is relevant here. That limitation requires the "insert" fitted into the outlet cover's base plate to be "within the aperture" of the base plate. Pet. App. 3a; C.A. App. A169, col. 8, line 52; A170, col. 9, lines 43-44, 59-

60; A173, col. 2, lines 13-14. Prior to the patent's reexamination, claim 14 stated that the insert merely had to be "adapted to be mounted in the base"of the outlet cover. Pet. App. 4a. After an amendment to overcome the patent examiner's rejection during the reexamination, claim 14 states that the insert must be "adapted to be accommodated with[in] the aperture" of the base of the outlet cover. *Id.*

3. A request for reexamination of the '135 patent was filed on September 21, 1995.*

a. On March 6, 1996, the United States Patent and Trademark Office ("the PTO") rejected claims 1, 3-12, and 14-18 of the '135 patent as obvious in light of the prior art. Specifically, the PTO noted that another patent, U.S. Letters Patent No. 2,980,283, issued to Arthur R. Bentsen in 1961 (the "Bentsen Patent") had already disclosed the use of inserts over a baseplate to cover electrical outlets. The PTO concluded that it would have been obvious to incorporate this system of inserts into a *weatherproof* outlet cover, which had been disclosed in U.S. Letters Patent No. 4,381,063, issued to Henry Leong in 1983. C.A. App. A922-23; A1053. The prior art also contained numerous other patents disclosing designs for outlet covers involving bases with protective housings, some including plate inserts. C.A. App. A389-90; A392; A469-70; A878; A909-15.

b. Intermatic overcame these obviousness rejections (1) by arguing that the prior art only disclosed covers where

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* Reexamination is a "procedur[e] under which the patent owner or any person may (1) cite to the PTO patents or printed publications as prior art pertaining to the validity of claims in the patent, and (2) request that the PTO reexamine any claim of that patent on the basis of the cited prior art." Donald A. Chisum, 4 *Chisum on Patents*, § 11.07[4] at 11-385 to 11-386 (2001). If the PTO determines that the cited prior art raises "a substantial new question of patentability," "the claim or claims in question are reexamined according to the procedures for initial examination." *Id.* at 11-386.

inserts were mounted "over" an aperture in the base plate, and not "within" the aperture, and (2) by amending some claims to incorporate the "within the aperture" limitation. As to independent claim 1 of the patent, Intermatic distinguished the Bentsen Patent and other patents by arguing at a November 25, 1996 interview with the patent examiner that the prior art only rendered obvious inserts "over" the aperture of the base plate, but not "within" the aperture, and by assuring the PTO that claim 1 was limited to the latter sort of insert, which is "within" the aperture. Addendum to Brief of Defendant-Appellee in No. 01-1028, *Intermatic, Inc. v. Lamson & Sessions Co.* at 5-12. Correspondingly, Intermatic overcame the obviousness rejection of claim 14, which previously required only that the insert be "adapted to be mounted in the base," by agreeing on September 8, 1997 to narrow that limitation by amending it to its current language, which includes the "within the aperture" limitation already present in claim 1. *Id.* at 14-15; C.A. App. A1055.

c. Importantly, during the reexamination proceeding, Intermatic's counsel presented to the PTO, as early as April 18, 1996, actual samples of the actual Lamson outlet covers Intermatic accused of infringement in this case, C.A. App. A960, A964-65, yet Intermatic still did not obtain literal coverage of that design in the reexamined patent that ultimately issued. C.A. App. A960; A964-65; A1055.

4. Intermatic initiated its first suit against Lamson ("*Intermatic I*") in September 1994, charging that certain Lamson outlet covers infringed seventeen of the nineteen claims in the '135 Patent. Pet. App. 7a

a. Even though the accused covers in *Intermatic I* did not fit "within the aperture" of the base plate as required to infringe the asserted claims of the '135 Patent, but rather were mounted in a frame *over* the opening, the district court permitted the case to proceed to the jury to decide the question whether certain narrow plastic "ribs" protruding from the

accused Lamson insert plates constituted the equivalents of inserts "within the aperture." Pet. App. 7a. The district court did so despite evidence that the Bentsen product, which GE sold in the 1960s, also had small "ribs" of material surrounding the screwhole in the insert that projected into the aperture. C.A. App. A156-57.

b. After the district court had issued a summary-judgment ruling making clear that *only* the ribs of Lamson's accused products presented any risk of infringement, Lamson changed its molds, obtained approval for a ribless design that was identical in all other pertinent features to the accused ribbed design, and put on the market outlet covers using these new "ribless" inserts. Pet. App. 7a-9a; C.A. App. A1850-53; A1867-70.

c. The jury in *Intermatic I* ruled for Intermatic, finding that the Lamson covers infringed claims 1, 3, 4, 6-9, and 11-18 of the '135 Patent under the doctrine of equivalents. Pet. App. 8a. The jury concluded that claims 5 and 10 were not infringed. C.A. App. A157.

5. In December 1999, after *Intermatic I* had proceeded to final judgment, Intermatic filed a second patent-infringement suit against Lamson ("*Intermatic II*") charging that the redesigned "ribless" Lamson covers also infringed the '135 Patent. Pet. App. 9a. The district court granted summary judgment of noninfringement in favor of Lamson in *Intermatic II*, holding that Intermatic's conduct during the prosecution history of the '135 Patent gave rise to prosecution-history estoppel with regard to covers lacking any structure "within the aperture." Pet. App. 9a.

6. The Federal Circuit reversed the judgment of infringement in *Intermatic I* and affirmed the judgment of noninfringement in *Intermatic II*.

a. The Court of Appeals agreed with the district court that the Lamson covers in the two cases did not literally

infringe the '135 Patent. Pet. App. 15a-16a. The Federal Circuit also concluded that Intermatic's narrowing of the "insert" limitation (from "mounted in the base" to "within the aperture" of the base) during the prosecution of the '135 Patent precluded its claim of infringement by equivalents. Pet. App. 16a-21a.

b. With respect to claim 14, the majority reasoned that the narrowing of that claim during reexamination in order to avoid an obviousness objection disclaimed covers using inserts merely "mounted in the base," but not "within the aperture" of the base. Pet. App. 17a. It cited the Federal Circuit's *en banc* decision in *Festo* to support its conclusion that Intermatic's claimed equivalent was unavailable. *Id.*

c. With respect to claim 1, the majority observed that under the Federal Circuit's prior decision in *Builders Concrete, Inc. v. Bremerton Concrete Products Co.*, 757 F.2d 255 (Fed. Cir. 1985), "any estoppel generated by [a narrowing amendment in one claim] applies to all other claims in the patent containing that limitation." Pet. App. 18a-19a. Because claim 1 included the same "within the aperture" limitation as claim 14, the majority held that prosecution-history estoppel foreclosed Intermatic from obtaining liability under the doctrine of equivalents for that claim as well. Pet. App. 19a-20a.

d. The Federal Circuit's ruling was not "a 2-1 decision," as the petition claims (Pet. 6), but a 3-0 decision. The only division on the panel was the result of Judge Newman's separate *concurring* opinion. Pet. App. 24a-25a. Judge Newman, who dissented from the Federal Circuit's *en banc* ruling in *Festo*, opined that in her view the absolute bar of the Federal Circuit's *Festo* decision did *not* apply, but that nonetheless, "[o]n review of the facts and the law of this case, I reach the same result as does the court." Pet. App. 24a.

7. a. On April 18, 2002, and May 28, 2002, Intermatic applied for and was granted extensions of time for filing its

petition for certiorari so that it could address this Court's imminent ruling in *Festo*.

b. Also on May 28, 2002, this Court issued its opinion in *Festo*. In that decision, this Court replaced the Federal Circuit's absolute bar (against application of the doctrine of equivalents after a narrowing amendment) with a *presumption* of an absolute bar, which this Court stressed could only be overcome by a showing that, at the time of the narrowing amendment, one of ordinary skill in the art could not have been expected to draft a claim that would literally encompass the known equivalent:

> A patentee's decision to narrow his claims through amendment may be presumed to be a general disclaimer of the territory between the original claim and the amended claim. . . . There are some cases, however, where the amendment cannot reasonably be viewed as surrendering a particular equivalent. The equivalent may have been unforeseeable at the time of the application; the rationale underlying the amendment may bear no more than a tangential relation to the equivalent in question; or there may be some other reason suggesting that the patentee could not reasonably be expected to have described the insubstantial substitute in question. In those cases, the patentee can overcome the presumption that prosecution history estoppel bars a finding of equivalence. . . . *The patentee must show that at the time of the amendment one skilled in the art could not reasonably be expected to have drafted a claim that would have literally encompassed the alleged equivalent.*

122 S. Ct. at 1842 (emphasis added; citations omitted).

c. On July 5, 2002, well over a month after this Court's decision in *Festo*, Intermatic filed its petition for certiorari in this Court.

d. On August 1, 2002, the Federal Circuit decided *Allen Engineering Corp. v. Bartell Industries, Inc.*, 299 F.3d 1336

(Fed. Cir. 2002), which reaffirmed that, even after this Court's decision in *Festo*, an "estoppel affecting a limitation in one claim will also extend to all claims in which that limitation appears." *Id.* at 1350 (quoting *Southwall Techs., Inc. v. Cardinal IG Co.*, 54 F.3d 1570, 1584 (Fed. Cir. 1995)).

REASONS FOR DENYING THE PETITION

The petition fails to offer any legitimate basis for the GVR relief it seeks. Petitioner argues that it is entitled to GVR because, if the Court of Appeals had applied the rebuttable presumption of a complete bar articulated in this Court's *Festo* decision, "it would have concluded that Intermatic did not surrender the particular equivalents at issue *because asserted claims were already allowed at the time of the narrowing amendment to claim 14*." Pet. 7-8 (emphasis added). This claim is triply flawed. *First*, it does not even attempt to address the GVR standard established by this Court's decisions. *Second*, the petition does not argue that the aspect of *Festo* that was altered by this Court could possibly affect the outcome of this case. *Third*, the lone argument it does offer for GVR has been repeatedly rejected both before and after this Court's *Festo* decision, so there is no possibility that this argument would yield a different result in the case of a remand.

1. Intermatic ignores the GVR standard established by this Court's decisions. Under that standard, Intermatic must demonstrate that

> intervening developments, or recent developments that [this Court] ha[s] reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation.

Lawrence v. Chater, 516 U.S. 163, 167 (1996). Thus, Intermatic must show that this Court's intervening *Festo*

decision is "sufficiently analogous and, perhaps, decisive to compel re-examination of the case." *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964); *see generally* Robert L. Stern & Eugene Gressman, *Supreme Court Practice* 317-20 (8th ed. 2002).

Intermatic not only ignores the foregoing authorities, but wholly neglects the standard they impose. Intermatic's only effort to explain why this case meets the standard for GVR is its observation that "several *other* cases" have been remanded in the wake of *Festo*. Pet. 8 (emphasis added). But the existence of some *other* cases that have rested upon premises that have been undermined by this Court's *Festo* decision in a way that could affect their outcomes says nothing about whether *this* case rests upon such a premise affected by this Court's *Festo* decision.

2. Intermatic's petition fails to satisfy the applicable standard for GVR. It makes no effort to show that the test this Court set out in *Festo* could possibly be applied in a way that would alter the outcome of this case. Indeed, its only discussion of *Festo*'s application is its vague claim that the Federal Circuit needs to decide anew "whether the patent owner 'can demonstrate that the narrowing amendment[] did not surrender the particular equivalents at issue.'" Pet. 7 (quoting *Festo*, 122 S. Ct. at 1842 (section of opinion addressing the remand of that particular case)).

In fact, however, this Court in *Festo* explained precisely what is required in order to demonstrate that an equivalent is "surrender[ed]," yet Intermatic does not even allege that it could make that showing here. *Festo* held that "surrender" is *presumed* by the fact of a narrowing amendment for the purpose of securing patentability, 122 S. Ct. at 1842, and that the burden then shifts to the patent owner (here, Intermatic) to rebut that presumption. *Id.* Moreover, the Court held that to rebut the presumption of surrender, Intermatic is required to show that "at the time of the amendment one skilled in the art

could not reasonably be expected to have drafted a claim that would have literally encompassed the alleged equivalent." *Id.*

Intermatic does not dispute that its narrowing amendment of claim 14 triggered the presumption of surrender. But the more important point is this: Intermatic does not allege that, at the time of that amendment, it could not reasonably have been expected to draft a claim literally encompassing Lamson's outlet covers — and that would have been a very difficult argument for Intermatic to make, since Intermatic actually had the accused Lamson outlet covers in hand when it made that narrowing amendment. Because Intermatic does not even address the governing standard under *Festo*, or explain how a remand could possibly result in a different outcome under the applicable standard, it has failed to articulate any legitimate basis for GVR.

3. The one argument for GVR that Intermatic does offer has nothing to do with whether there is an estoppel here, but only whether the estoppel applies to the same term in other claims. That argument is irrelevant to and unaffected by *Festo*, and has been rejected by the Federal Circuit both before and — more importantly — *after* this Court's *Festo* decision. This demonstrates that there is no "'reasonable probability' that the Court of Appeals would reject [this] legal premise on which it relied," *Taylor v. Cain*, 533 U.S. 656, 666 n.6 (2001), and therefore no likelihood whatsoever of a different result upon remand.

a. Intermatic argues that its narrowing amendment of claim 14 did not surrender coverage of the Lamson covers "because asserted claims" — *i.e.*, claim 1 and its dependent claims — "were already allowed at the time of the narrowing amendment to claim 14." Pet. 8. In other words, Intermatic does not dispute that the narrowing amendment to the "mounted in the base"/"within the aperture" claim limitation in claim 14 works an estoppel; nor does Intermatic claim that it could possibly overcome the presumptive absolute bar with

respect to that claim limitation. Instead, Intermatic merely argues, as it did below, that the estoppel caused by the amendment to claim 14 does not carry over to the identical "within the aperture" limitation of claim 1. This argument, of course, does not even purport to make the necessary showing under *Festo* — that Intermatic "could not reasonably [have] be[en] expected to have drafted a claim that would have literally encompassed the alleged equivalent." 122 S. Ct. at 1842. Rather, it is simply an argument that an admitted estoppel as to a limitation appearing in one claim should not be carried over to the identical limitation in another claim, whether or not the second claim was amended.

This, of course, is not a question affected by *Festo*, because the *fact* of estoppel as to the claim 14 limitation is undisputed. Rather, Intermatic's petition presents the question, unaffected by *Festo*, of whether the admitted estoppel in the one claim *carries over* to the same limitation in another claim. And here, on this latter question, the Federal Circuit has repeatedly and unwaveringly rejected Intermatic's argument in a line of cases independent of *Festo*. These cases hold that amendment-based prosecution-history estoppel "will apply to that term in other claims." *Southwall*, 54 F.3d at 1584. Thus, in *Builders Concrete*, the court of appeals held that "[t]he fact that the [relevant] clause of patent claim 10 was not itself amended during prosecution does not mean that it can be extended by the doctrine of equivalents to cover the precise subject matter that was relinquished in order to obtain allowance of claim 1." 757 F.2d at 260; *see also Am. Permahedge, Inc. v. Barcana, Inc.*, 105 F.3d 1441, 1445 (Fed. Cir. 1997) (similarly applying prosecution history estoppel to the same element in an unamended claim); *Alpex Computer Corp. v. Nintendo Co.*, 102 F.3d 1214 (Fed. Cir. 1996) (same).

Importantly, the Federal Circuit has reaffirmed this principle *since* this Court's ruling in *Festo*, again holding that prosecution-history estoppel as to a single limitation extends "to all claims in which that limitation appears." *Allen Eng'g*,

299 F.3d at 1350 (citing *Southwall*, 54 F.3d at 1584). These decisions foreclose Intermatic's argument that the PTO's allowance of claim 1 entitles Intermatic to a broader range of equivalents with regard to the phrase "within the aperture" in claim 1 than with regard to the exact same element in amended claim 14. The Court of Appeals expressly based its decision below on this principle, which this Court's *Festo* decision does not affect. *See* Pet. App. 19a (concluding "that the principles espoused in *Builders* equally apply to a claim limitation that was narrowed in order to obtain allowance of a claim during reexamination, despite the fact that the resulting estoppel may retroactively extend to original, unamended claims"). There is therefore no possibility that the intervening decision of this Court in *Festo* could affect the judgment of the Court of Appeals in this case.

b. It is understandable why Intermatic does not even try to explain how this Court's decision in *Festo* could possibly alter the outcome of this case. Intermatic could not possibly have met its burden of showing that it has any reasonable likelihood of overcoming the *Festo* presumption on remand. The '135 Patent, after all, is for a plastic outlet cover, not some technologically complex device where it would have been difficult to describe the claimed equivalents. *See* Brief for the United States in No. 00-1543, *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.* at 27 (suggesting that rebuttal of the presumption of surrender will be most likely where complex technology is at issue).

In order to rebut the *Festo* presumption, Intermatic would have had to have shown that, "at the time of the amendment," it could not reasonably have been expected to draft claim language literally covering the Lamson products. But Intermatic's counsel actually presented to the PTO samples of the very Lamson covers they accused of infringement, and with the accused devices in hand would have had no problem drafting language literally covering those devices — such as, for example, a patent claim incorporating a description of

inserts "with ribs extending into the aperture." C.A. App. A960; A964-65; A1055. (Nor were the Lamson covers the first in this field to use such ribs. The Bentsen product, too, which was sold by General Electric in the 1960s, has similar small ribs of material surrounding the screw hole that projected down into the aperture. C.A. App. A156-57.)

c. The irrelevance of *Festo* to the panel's decision in this case is confirmed by Judge Newman's concurring opinion below. Judge Newman, who dissented from the absolute-bar holding of the Federal Circuit's *Festo* decision, wrote separately to *concur* in the judgment in this case, emphasizing that even though she believed that the complete bar did not apply in this case, Pet. App. 24a-25a, she nonetheless "reach[ed] the same result as d[id] the court." Pet. App. 24a. Thus, the concurrence of Judge Newman confirms that the outcome of the case below did not in any way depend upon the complete bar this Court rejected in its *Festo* decision. *See* Pet. App. 20a n.3 (majority opinion; noting that Judge Newman's concurrence analyzed the estoppel as to the unamended claims "under the flexible bar rejected in *Festo*," but reached the same result).

4. Finally, petitioner's subsidiary complaint that failure to GVR would subject Intermatic to "disparate treatment under the law," Pet. 8, is meritless. It is not disparate treatment to remand cases whose holdings are legitimately called into question by *Festo*, but not remand other, different cases — such as this case — whose holdings are not affected by *Festo*.

Moreover, unlike the other petitioners to whom it points, Intermatic requested and received extensions of time to file its petition so that it could address this Court's decision in *Festo*, and it was not required to file its petition until over a month *after* this Court issued its decision in *Festo*. Once consequence of this delay, of course, is that we now know that the Federal Circuit has again rejected, even after *Festo*, the sole argument for GVR offered by Intermatic. But Intermatic's later filing

also demonstrates that Intermatic was not similarly situated to those other petitioners — it, unlike those other petitioners, had this Court's *Festo* decision in hand, and therefore knew precisely what it would be obligated under *Festo* to explain: how it could "show at the time of the amendment [that] one skilled in the art could not reasonably be expected to have drafted a claim that would have literally encompassed" the Lamson covers. 122 S. Ct. at 1842. Intermatic did not make that showing, because it could not.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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